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FILED
MAR 10 1960
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. [redacted] 776

ROBERT H. CAIN,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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ROBERT H. CAIN,

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PETITION FOR WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, ENTERED IN THE ABOVE ENTITLED CAUSE ON FEBRUARY 12, 1960.

OPINION BELOW.

The opinion of the District Court is not reported. The opinion of the Court of Appeals for the Fifth Circuit is not reported. A copy of that opinion is annexed to this petition as Appendix A.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 12, 1960 (R-124). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

QUESTION PRESENTED.

Do private letters which are coarse and abusive constitute the crime of obscenity?

STATUTES INVOLVED.

The statutory provision involved is Section 1461, Title 18 U. S. C. It is printed in Appendix B.

STATEMENT.

Petitioner, Robert Cain, mailed two coarse and abusive letters to his girl friend. He was found guilty by a jury on counts one and three of a four-count indictment of mailing two letters alleged to be "indecent, filthy and vile", in violation of Section 1461, Title 18 U. S. C.[1] Before trial petitioner filed a motion to dismiss the indictment on the ground that the mailing of the letters by defendant did not violate the statute, since the letters were merely coarse and abusive and did not appeal to a prurient interest or sexually stimulate the addressee. The motion to dismiss also charged that the statute violated the First Amendment of the Constitution as a denial of the freedom of speech. Petitioner also charged that the statute does not define the acts it intends to prohibit and, therefore,

[1] The statute in part reads: Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance is declared to be non-mailable matter.

is unconstitutional as violating the Fifth Amendment. These motions were denied, and after trial petitioner was sentenced to one year on each count, the execution suspended. Petitioner appealed to the Court of Appeals for the Fifth Circuit, which court affirmed the conviction.

REASON FOR GRANTING THE WRIT.

1. The statute involved does not apply to private letters unless they are "obscene" as defined by this Court in *Roth v. United States*, 354 U. S. 496.

* * * * * *

In *Roth* this Court addressed itself to a single criterion for non-mailable matter, that which was obscene, Mr. Justice Brennan said:

> "Obscene material is material which deals with sex in a manner appealing to prurient interest." *Roth v. United States*, 354 U. S. 487.

The Court of Appeals for the Fifth Circuit used a different criterion for judging obscenity here, as it felt petitioner was not charged with "obscenity" but specifically as the indictment shows, for mailing an "indecent, filthy, and vile" letter. This was error as this Court and the other circuit courts have held there is but one class of material which is prohibited by Section 1461: the obscene.

In *Swearingen v. United States*, 161 U. S. 446, this Court held that even though the article mailed was coarse and vulgar it was not calculated to debauch the morals of those who might read it, nor could it be considered lewd or obscene.

The opinion of the Court of Appeals clearly is in direct conflict with the Supreme Court in *Roth* and *Swearingen*. There can be no conviction where the letters are merely coarse and abusive and not calculated to induce sexually impure thoughts.

The Court of Appeals said of petitioner's letters:[2]

> "couched in shocking and disgusting language fit for use only in gutters, brothels and like places, the letters villified and defamed . . ." (Appendix A.)

We submit that this is not sufficient to constitute a violation of the statute. A violation can only occur when the material appeals to a prurient interest.

The opinion below not only conflicts with the decision of this Court, but also those of the courts of appeal. In *United States v. Keller*, 259 F. (2d) 54, the Third Circuit held that though the articles mailed were filthy and vile, and the defendant sought to embarrass and humiliate the addressee, the language was not obscene as defined by this Court in *Roth, supra*. In *Keller*, the Court of Appeals for the Third Circuit said:

> "Congress did not intend separate classifications of non-mailable matters for each of these adjectives: 'indecent', 'lewd', 'lascivious' and 'obscene' in Sections 1461 and 1463. Moreover the Supreme Court in Roth addressed itself to a single criterion for the objectionable matter, while the court spoke of 'judging obscenity' the essence of what was said does not permit a less stringent test for judging 'indecent' material."

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[2] Letters mailed by petitioner reproduced (R. 34-37).

This construction is supported by the doctrine of *ejusdem generis*, whereby general words of description which follow more specific terms are restricted in meaning by those which are more specific. The Fifth Circuit's opinion is in conflict with the Third Circuit. The Third Circuit said the word 'indecent' took its sense and meaning from the associated words in the statute, and thus indecent (like filthy and vile) was limited in its meaning and could be no broader than the definition of "obscenity" as outlined in *Roth, supra.*

Thus the Court of Appeals for the Fifth Circuit has erred in the construction of a federal statute, and that error has resulted in a conflict with previous decisions of this Court, in *Roth* and *Swearingen*, and it conflicts with a decision of another court of appeal, the Third Circuit, in *Keller, supra.*

2. The obscenity statute, Section 1461, Title 18 U. S. C., violates the First and Fifth Amendments of the Constitution of the United States.

Petitioner in the courts below has attacked the constitutionality of the "obscenity statute" on the grounds that it violated the First Amendment by attempting to regulate the freedom of speech, and that it violates the Fifth Amendment by being too vague and incapable of definition.

All speech is not protected. The government has the power to restrict seditious speech directed against it. But it has no such national purpose with respect to protecting itself against pornography, the dangers of federal